Re Mat Shah bin Safuan, ex p United Asian Bank Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D 2-29-13090-89
SITI NORMA YAAKOB J
20 OCTOBER 1990

Bankruptcy — Bankruptcy notice — Whether prematurely issued — Authority of officer to present petition — Whether debtor's ability to settle the judgment debt entitled the court to dismiss the petition — Bankruptcy Act 1967, ss 6(2), (3), 15(1) & 133 — Bankruptcy Rules 1969, rr 150 & 215

Under a consent judgment the debtor was to settle the judgment sum by eight quarterly instalments, the first of which was to be paid on or before 30 September 1989 and the subsequent instalments every 90 days thereafter and in the event of default of any one instalment or part thereof, the whole of the remaining judgment sum would become due and payable forthwith. The debtor contended that two weeks before the first instalment was due, the judgment creditor had orally agreed to allow the debtor to pay the first instalment due together with the second instalment due on 29 December 1989 and because of this maintained that the bankruptcy noticed dated 23 November 1989 had been prematurely issued as at that date no instalment was due from him. The debtor also questioned the authority of the judgment creditor's manager/attorney who affirmed the truth of the statements in the petition and presented the petition. In addition, it was argued by the debtor that since he had sufficient assets to settle the judgment in full, the petition could not be entertained. The debtor applied to set aside the bankruptcy notice and the judgment creditor's petition.

Held, dismissing the debtor's application:

(1) From the debtor's own affidavit and conduct, there was no conclusive evidence that there had been an agreement to extend payment of the first instalment beyond the date agreed to in the consent order.

(2) The power of attorney gave wide powers to the judgment creditor's manager/attorney to act on behalf of the judgment creditor in all matters arising out of the bankruptcy of any person indebted to the judgment creditor. By virtue of his official standing alone, he had every authority to present a petition on behalf of the judgment creditor and there was no question that there had to be a board resolution passed authorizing him to use the seal. This would only be relevant where a corporation chose an agent who was not a bank officer to act on its behalf.

(3) The ability to settle any judgment debt in full under s 6(2) of the Bankruptcy Act 1967 must be established before the act of bankruptcy is committed, ie before the expiry of the seven days after service of the bankruptcy notice on the debtor. Here, the debtor had already committed an act of bankruptcy and it was therefore too late for the debtor to submit that he had sufficient assets with which he could pay the judgment debt in full.

(4) Under s 6(2) of the Act, once the debt of the petitioning creditor and the act(s) of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements had been fulfilled and the court was empowered to make a receiving order against the debtor.

[Bahasa Malaysia summary

Di bawah satu penghakiman persetujuan, penghutang dikehendaki menunaikan jumlah penghakiman melalui lapan bayaran ansuran suku tahun. Bayaran yang pertama mesti dibuat pada atau sebelum 30 September 1989 dan bayaran ansuran selepasnya tiap-tiap 90 hari selepas itu dan jika berlaku keingkaran dalam mana-mana bayaran ansuran atau sebahagian daripadanya, kesemua jumlah penghakiman yang tinggal mesti dibayar serta-merta. Penghutang mengatakan bahawa dua minggu sebelum bayaran ansuran pertama mesti dibayar, pemiutang penghakiman telah bersetuju secara lisan untuk membenarkan penghutang membayar bayaran ansuran pertama bersama dengan bayaran ansuran kedua yang mesti dibayar pada 29 Disember 1989. Oleh kerana itu penghutang mengatakan bahawa notis kebankrapan bertarikh 23 November 1989 telah dikeluarkan sebelum masanya kerana pada tarikh itu tiada bayaran ansuran yang mesti dibuat olehnya. Penghutang juga menyoal tentang kuasa pengurus/wakil pemiutang penghakiman yang mengesahkan kebenaran pernyataan dalam pestisyen dan menyampaikan petisyen itu. Tambahan pula, telah dihujahkan oleh penghutang bahawa memandangkan yang beliau mempunyai aset yang cukup untuk menunaikan penghakiman itu sepenuhnya, petisyen itu tidak harus diterima. Penghutang memohon untuk mengenepikan notis kebankrapan dan petisyen pemiutang penghakiman.

Diputuskan, menolak permohonan penghutang:

(1) Dari afidavit dan kelakuan penghutang, tidak terdapat keterangan yang meyakinkan bahawa telah ada persetujuan untuk melanjutkan pembayaran bayaran ansuran yang pertama melepasi tarikh yang dipersetujui dalam perintah persetujuan.

(2) Kuasa wakilan itu memberikan kuasa yang meluas kepada pengurus/wakil pemiutang penghakiman untuk bertindak bagi pihak pemiutang penghakiman dalam semua hal bersangkutan dengan kebankrapan sesiapa yang berhutang kepada pemiutang penghakiman. Mengikut kedudukan rasminya sahaja, beliau mempunyai cukup kuasa untuk menyampaikan petisyen bagi pihak pemiutang penghakiman dan tidak ada soalan bahawa resolusi yang diluluskan oleh lembaga diperlukan untuk membenarkannya menggunakan meterai. Ini adalah relevan cuma bila sebuah korporasi memilih seorang ejen yang bukan seorang pegawai bank untuk bertindak bagi pihaknya.

(3) Kebolehan menunaikan apa-apa hutang penghakiman sepenuhnya di bawah s 6(2) Akta Kebankrapan 1967 mesti didirikan sebelum perbuatan kebankrapan dilakukan, iaitu sebelum tamatnya tempoh tujuh hari selepas penyampaian notis kebankrapan kepada penghutang. Di sini, penghutang telah melakukan perbuatan kebankrapan dan adalah terlalu lewat untuk penghutang menyatakan bahawa beliau mempunyai cukup aset untuk menjelaskan hutang penghakiman sepenuhnya.]

Legislation referred to
Bankruptcy Act 1967 ss 6(2), (3), 15(1), 133
Bankruptcy Rules 1969 rr 150, 215

MS Murthi for the debtor.
Dato KL Rekhraj for the judgment creditor.

Cur Adv Vult

Siti Norma Yaakob J: In applying to set aside the bankruptcy notice and creditor's petition issued against him, the debtor raised three issues:

(1) whether the bankruptcy notice had been prematurely issued on 23 November 1989 as at that date no sum was due to the judgement creditor on the consent judgment on which the bankruptcy notice is founded;
(2) whether S Sinnappan, the manager and officer, holding a power of attorney for the judgment creditor, has the authority to present the petition;
(3) whether the debtor's ability to settle the judgment debt entitles the court to dismiss the petition.

Under the consent judgment dated 30 August 1989, the debtor was to settle the judgment sum of $2.5m by eight quarterly instalments of $312,500 each, the first of such instalments to be paid on or before 30 September 1989 and the subsequent instalments every 90 days thereafter, and in the event of default of any one instalment or part thereof, the whole of the remaining judgment sum becomes due and payable forthwith.

It is the debtor's contention that two weeks before the first instalment was due, the senior manager of the judgment creditor had orally agreed to allow the debtor to pay the first instalment due together with the second instalment on 29 December 1989 and by virtue of this collateral agreement, the debtor maintains that the bankruptcy notice dated 23 November 1989 had been prematurely issued as at that date no instalment was due from him.

The determination of whether the bankruptcy notice has been prematurely issued presupposes that there had been an understanding reached whereby the judgment creditor agreed to extend time until 29 December 1989 for the debtor to pay the first instalment together with the second instalment, which also fell due on that date. According to the debtor that arrangement was reached following his telephone conversation with the senior manager of the judgment creditor on 17 September 1989 and in his affidavit, he has referred to a note which he had kept of the telephone conversation but unfortunately he had failed to exhibit the note.

The judgment creditor has denied any such telephone conversation or agreement and the debtor's subsequent conduct following the issue of the bankruptcy notice does not support his contention of there being any collateral agreement at all. To begin with the existence of this collateral agreement is alluded to for the first time and since 5 February 1990, when the petition was before me for the first time, there was no mention made of this collateral agreement other than the debtor asking for time to settle the whole matter. This is borne out by the debtor's letter dated 24 January 1990 wherein he asked for three months extension to pay the judgment debt in full and he also expressed the manner in which he proposed to settle the outstanding sum.

From the debtor's own affidavit and conduct, there is no conclusive evidence to enable me to reach a finding that there had been a concluded agreement to extend payment of the first instalment beyond the date agreed to in the consent order.

Still on the bankruptcy notice, objection was also taken that the served copy was not a sealed copy. This is contrary to the process server's report who affirmed that a duly sealed copy of the notice was served on the debtor personally on 11 December 1989 and duly acknowledged by the debtor. The only way to settle this disputed fact is for the debtor to produce the unsealed copy that was served on him. As he had failed to do so, I see no merit to his objection at all.

The petition in these proceedings is presented by S Sinnappan, the manager and the attorney of the judgment creditor and who also affirmed the truth of the statements in the petition. In this instance, the debtor questioned the authority of S Sinnappan as from discreet inquiries he had made at the headquarters of the judgment creditor, the debtor has discovered that S Sinnappan only holds a delegated power of attorney and that he did not have the authority to use the seal of the judgment creditor as no resolution to that effect had been passed by the board of directors of the judgment creditor authorizing him to use the seal. For this contention the debtor relies on r 215 of the Bankruptcy Rules 1969, which states as follows:

> Proceedings by Corporation
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> 215 Officer of corporation, etc. When a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act on his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within s 133 and if duly authorised under seal can act for the corporation.

Section 133 of the Bankruptcy Act 1967, refers to acts of corporations, firms and mentally disordered persons and for that purpose '(a) a corporation may act by any of its officers authorized on that behalf under the seal of the corporation'.

From the petition in these proceedings, it is clear that it is presented by the judgment creditor, a corporate body and signed by S Sinnappan, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb of r 215. The power of attorney dated 23 May 1973 gives wide powers to S Sinnappan to act on behalf of the judgment creditor and under cl 8(d) it expressly states that he can act singly on behalf of the judgment creditor in all matters arising out of the bankruptcy of any person indebted to the bank. By virtue of his official standing alone, he has every authority to present a petition on behalf of the judgment creditor and there is no question that he

needs the authority to use the seal of the judgment creditor or that there must be a board resolution passed authorizing him to use the seal. That is only relevant where a corporation chooses an agent, who is not a bank officer, to act on its behalf and under those circumstances, the agent is also referred to as 'an officer' within the meaning of s 133(a) of the Act.

The debtor also contends that since he has sufficient assets to settle the judgment in full, the petition cannot be entertained.

The ability to settle any judgment debt in full under s 6(3) Bankruptcy Act 1967 must be established before the act of bankruptcy is committed, ie before the expiry of the seven days after service of the bankruptcy notice on the debtor. In this case the debtor had already committed an act of bankruptcy and it is therefore too late at this stage of the proceedings for him to submit that he has sufficient assets with which he can pay the judgment debt in full. In fact he had been stating so since 5 February 1990 when the petition was heard for the first time and the petition had been adjourned twice to enable him to effect settlement but this came to nothing.

As I had overruled all of the debtor's objections, I had accordingly dismissed his motion with costs.

Coming to the petition itself, the debtor contends that the court is only empowered to make a receiving order pursuant to the prayer contained in the first paragraph of the petition and also pursuant to s 6(2) of the Act. Consequent upon such an order, a general meeting of creditors will be held under s 15(1) of the Act for the purpose of considering whether a proposal for a composition or scheme of arrangement shall be entertained and under r 150(2) once a resolution for the acceptance of the composition or arrangement has been passed by the creditors at the first meeting and before the holding of a subsequent meeting to confirm the resolution, the debtor informs the Official Assignee in writing that he is unable to carry out the proposed composition or scheme or if at the subsequent meeting the proposed composition or scheme is not confirmed, the Official Assignee shall apply to the court to adjudicate the debtor a bankrupt and the court may so adjudge him without any further notice to him. In view of the specific provisions in the Act and the rules, the debtor contends that he must be given the chance to submit a proposal for the composition or scheme of arrangement to his creditors before the court is empowered to adjudge him a bankrupt.

Under s 6(2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements have been fulfilled and pursuant to para 1 of the petition, I am empowered to make a receiving order against the debtor. Under r 150(1) when a receiving order has been made, any creditor or the Official Assignee may apply to the court to adjudge the debtor bankrupt. In this case the judgment creditor orally applied to have the debtor adjudged a bankrupt and I had in deference to the debtor's objection adjudged him so as s 15(1) and r 150(2) do not prohibit me from making such an adjudication order. These provisions merely set out the procedures to be followed after a receiving order has been made and they are merely the administrative acts of the Official Assignee and have nothing to do with the jurisdiction of the court to adjudicate a debtor a bankrupt under r 150(1) on the oral application of the judgment creditor, following the making of a receiving order on him.

The debtor had also applied orally for a stay of the receiving and adjudication orders on the ground that he would be appealing to the Supreme Court. As this is not a special circumstance that warrants the exercise of my discretion, I had accordingly disallowed the application for stay.

Application dismissed.

Solicitors: *Murthi & Partners; KL Rekhraj.*

Reported by *Yap Shao Sin*